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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JILL TOUPS, Plaintiff and Respondent, v. HONG BING CHEN et al., Defendants and Appellants.	A133657 (San Francisco County Super. Ct. No. CGC10498490)

This case arises from a third party's fraudulent acts, which plaintiff Jill Toups alleges resulted in damages to her and unjust enrichment to Hong Bing Chen, Yao Li, and Afresh Enterprises, Inc. (collectively, defendants). The trial court granted Toups's motion for summary judgment or summary adjudication and entered judgment in favor of Toups and against defendants on her causes of action for unjust enrichment and involuntary trust. The trial court thereafter denied Toups's motion for attorney fees and costs. Both parties appeal. For the reasons set forth below, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The undisputed facts are as follows. On or about March 6, 2002, Toups borrowed $14,788.43 from Christopher Ransom, Jr., and Ransom Property Company, Inc. (together, Ransom), and the loan was secured by a deed of trust on Toups's property located on Quesada Avenue in San Francisco (the Quesada Property). At some point thereafter, Ransom conducted a "phony foreclosure sale" of the Quesada property and took title to it. Ransom then borrowed $25,000 from Chen and her husband Li and secured the loan with a trust deed recorded against the Quesada property in favor of Chen and Li. Chen and Li did

not go through escrow, obtain title insurance, or otherwise take steps to verify whether Ransom actually owned the Quesada property.

Toups filed a lawsuit against Ransom for conducting a "phony foreclosure sale" (the 2004 lawsuit) and recorded a lis pendens against the Quesada property. Toups and Ransom reached a settlement pursuant to which Ransom gave Toups a quitclaim deed to the Quesada property and what appeared to be a valid reconveyance of the trust deed that secured Chen and Li's loan. However, it turned out that Ransom had actually forged Chen and Li's signatures on the reconveyance.

On or about February 25, 2008, Ransom again borrowed money against the Quesada property, this time in the amount of $300,000, from a man named Peter Spataro. Ransom was able to perpetrate this fraud because Toups had not yet recorded the quitclaim deed and reconveyance he had given her in connection with the 2004 lawsuit. Because the reconveyance had also not been recorded, Chen and Li's trust deed still encumbered the Quesada property, and an escrow agent contacted Chen and Li to obtain a payoff demand. Chen agreed to accept $33,000 from Ransom as a full payoff of the prior loan she and Li had made to Ransom. Ransom also paid Afresh Enterprises, Inc. (Afresh), a company wholly owned by Chen, an additional $50,000 from escrow for prior debts owed by Ransom to Chen and Afresh. Chen was aware that the $33,000 and $50,000 that she, Li and Afresh received was money Ransom had borrowed against the Quesada property.

At some point thereafter, Spataro recorded a Notice of Default against the Quesada property and Toups learned that Ransom had once again committed fraud by borrowing against the Quesada property. Toups filed a second lawsuit against Ransom and also named Spataro as a defendant in that action (the 2008 lawsuit). During the course of the litigation, Toups discovered that Ransom had used the proceeds of the $300,000 he had fraudulently borrowed from Spataro to pay off debts he owed to defendants. Toups filed a separate lawsuit against defendants (the instant action). In the meantime, in the 2008

lawsuit, Spataro recouped his $300,000 from a title insurance company,[1] and all claims arising from the 2008 lawsuit were settled, with the exception of Toups's claims against Ransom, which were still pending.

On February 23, 2011, Toups filed a second amended complaint—the operative complaint in the instant action—against Chen, Li and Afresh, alleging the following six causes of action: (1) unjust enrichment; (2) involuntary trust; (3) conversion; (4) intentional infliction of emotional distress; (5) negligence; and (6) violation of Penal Code section 496, subd. (c), receipt of stolen property. Toups sought various damages including exemplary damages and attorney "fees and costs pursuant to the doctrine of the tort of another . . . ."

On May 24, 2011, Toups filed a "Notice of and Motion for Summary Judgment and/or Summary Adjudication of the Plaintiff's First and Second Causes of Action." She argued that all the elements of her first cause of action for unjust enrichment against Chen and Afresh were satisfied, as were all the elements of her second cause of action for imposition of an involuntary trust against all named defendants. She raised no arguments as to her third, fourth, fifth and sixth causes of action. She sought attorney fees and costs under the "tort of another" doctrine. Defendants opposed the motion. In an order dated August 9, 2011, the trial court granted Toups's "Motion for Summary Adjudication . . . as to the First and Second causes of action." The trial court stated, "The parties agree that the facts of this case are undisputed, including the amount in dispute ($83,000). Plaintiff has met [her] burden of proving the elements of unjust enrichment[] and involuntary trust. While Plaintiff may be entitled to attorney fees under the 'tort of another' doctrine, the court cannot determine this on [an] MSA/MSJ because the specific amount of fees is in dispute. This should be brought in a separate motion for fees and costs. [¶] Judgment for the plaintiff as against all named defendants jointly [and] severally in the amount of $83,000.00." Toups then filed a motion for attorney fees and costs, which the trial court denied. Both parties appeal.

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[1] According to Toups's attorney, the title insurance company paid Spataro on the ground that the lis pendens that had been recorded on the Quesada property in connection with the 2004 lawsuit had never been vacated.

DISCUSSION

Appealability

Toups filed a "Motion for Summary Judgment and/or Summary Adjudication" but raised only arguments in support of her first and second causes of action. Although the trial court entered "Judgment" in favor of Toups, it granted "Summary Adjudication . . . as to the First and Second causes of action" and made no mention of the third, fourth, fifth and sixth causes of action. Because an appeal cannot be taken from a judgment that fails to completely dispose of *all* of the causes of action between the parties (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 736-744), we requested supplemental briefing from the parties on the issue of whether the "Judgment" from which they appealed was an appealable final judgment.

In response, the parties in essence requested that we proceed with deciding the merits of the appeal. Defendants' counsel stated the parties had agreed "to stipulate to toll the statute of limitations regarding the causes of action that were not decided at the summary judgment motion" and that Toups was going to "dismiss without prejudice said causes of action so that the judgment will be 'final' and appealable." Counsel further stated, "according to the trial court's record, the judgment was considered final since a Writ of Execution was issued to enforce the Judgment. The Judgment could not be enforced without it being final." Toups thereafter filed in the trial court a Request for Dismissal of the remaining four causes of action without prejudice and submitted to us a file endorsed copy of the Request for Dismissal.

The one final judgment rule "does not allow contingent causes of action to exist in a kind of appellate netherworld. . . . It makes no difference that this state of affairs is the product of a stipulation, or even of encouragement by the trial court. Parties cannot create by stipulation appellate jurisdiction where none otherwise exists." (*Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, 118 (fn. omitted) (*Don Jose's Restaurant*).) The Court in *Don Jose's Restaurant* " 'condemn[ed] the artifice of trying to create an appealable order from an otherwise nonappealable grant of summary adjudication by dismissing the remaining causes of action without prejudice but with a

waiver of applicable time bars.' " (*Id.* at p. 116; see also *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, 243-245; *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79, 82.) Thus, the parties' stipulation to dismiss the remaining causes of action *without* prejudice and to toll the statute of limitations as to those causes of action does not render the "Judgment" from which they appeal final and appealable.

Nevertheless, we shall exercise our discretion to address the merits of the appeal and cross-appeal for the reasons set forth below. An appellate court has the power to " 'preserve [an] appeal by amending the judgment to reflect the manifest intent of the trial court' " when " 'the trial court's failure to dispose of all causes of action results from inadvertence or mistake rather than an intention to retain the remaining causes of action for trial.' " (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 308; see also *Prichard v. Liberty Mut. Ins. Co.* (2000) 84 Cal.App.4th 890, 901.) Here, Toups filed a motion for "*Summary Judgment* and/or Summary Adjudication" (emphasis added) in which she sought to have her case adjudicated and judgment entered in her favor. She did in fact obtain a "Judgment" under which she was awarded the entire disputed amount, aside from attorney fees and costs. Further, even though all of Toups's causes of action against defendants were based on the same allegations, she chose to raise specific arguments only as to the first and second causes of action. In doing so, Toups displayed an intent to abandon the remaining causes of action for conversion, intentional infliction of emotional distress, negligence, and violation of Penal Code section 496, subdivision (c).[2] Defendants in turn addressed only the first and second causes of action in their opposition. The trial court evidently—and reasonably—deemed the remaining causes of action abandoned, as it did not sever those causes of action or retain jurisdiction over them, but rather, issued a "Judgment" and a writ of execution to enforce that judgment. Because it appears from the

[2] Although the recent filing of a Request for Dismissal without prejudice may reflect Toups's *current intent* to preserve her remaining causes of action, we must look to the "manifest intent" *of the trial court* in determining whether modification of a judgment is appropriate (see *Sullivan v. Delta Air Lines, Inc.*, *supra*, 15 Cal.4th at p. 308), *not* to what a party decides she wishes to do after having already submitted judgment and requested appellate review of the matter as if the judgment was final and appealable.

record that the trial court's failure to specifically provide for dismissal of the remaining causes of action resulted from inadvertence or mistake rather than an intent to retain those causes of action for trial, we hereby order the judgment modified to include dismissal of the third, fourth, fifth and sixth causes of action, and deem the parties' notices of appeal as taken from a final judgment.[3] Below, we turn to the merits of the appeal and cross-appeal.

Summary judgment standard

"[A]fter a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

"Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the 'moving party is entitled to a judgment as a matter of law' [citation], the court must grant the motion for summary judgment. [Citation.] . . . 'A plaintiff . . . has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff . . . has met that burden, the burden shifts to the defendant . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.' " (*Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305, 1320.) "In reviewing whether these burdens have been met, we strictly scrutinize the moving party's papers and construe all facts and

[3] Even if we were to conclude there is not a final, appealable judgment in this case, we would still have discretion to treat the failed appeal as a petition for a writ of mandate and reach the merits of the parties' dispute. (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1091, fn. 3; *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 651.)

resolve all doubts in favor of the party opposing the motion. [Citations.]" (*Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc*. (2011) 194 Cal.App.4th 623, 628.)

Unjust enrichment

The elements of a claim for unjust enrichment are: (1) "receipt of a benefit"; and (2) "unjust retention of the benefit at the expense of another." (*Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 726.) Thus, " 'the mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.' [Citation.]"[4] (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 134; see also Rest., Restitution, § 1, com c. [a person who receives a benefit at the expense of another is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it].) Restitution will be denied, for example, "if [a] mistaken payment is made to a bona fide creditor of a third person—a creditor without fault because it made no misrepresentations to the payor and because it had no notice of the payor's mistake at the time the payment was made. [Citation.]" (*City of Hope National Medical Center v. Superior Court* (1992) 8 Cal.App.4th 633, 636-637 (*City of Hope*).) Thus, in *City of Hope*, the Court held that because the defendant hospital was a bona fide creditor legitimately owed for services it had provided to a patient, it was not required to refund money it had received from the patient's insurer even though the insurer had paid the hospital mistakenly believing the patient's treatment was covered by his policy. (*Ibid.*)

The bona fide creditor defense to unjust enrichment also applies to situations in which a debtor who pays money to a bona fide creditor obtained the money by fraudulent or other wrongful means. (E.g., *Hilliard v. Bank of America Nat. Trust & Savings Ass'n* (1951) 102 Cal.App.2d 730 (*Hilliard*); *California Pacific Title & Trust Co. v. Bank of America Nat. Trust & Savings Ass'n* (1936) 12 Cal.App.2d 437 (*California Pacific*); *Montgomery v. Meyerstein* (1921) 186 Cal. 459 [plaintiff who sought to rescind a land sale

[4] Unjust enrichment is synonymous with restitution, as unjust enrichment is the result of a failure to make restitution under circumstances where it is equitable to do so. (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793.)

contract due to fraud was not entitled to seek restitution from preexisting lienholders whose liens had been satisfied out of the sales proceeds and who were unaware of the fraud].) In *Hilliard*, a car thief named Cassaro borrowed approximately $1,000 from a bank, gave the bank a chattel mortgage on the car, then sold it to a used car dealer for $1,250. (102 Cal.App.2d at p. 731.) The dealer paid the bank $1,000 to clear the title and later sold the car to another individual. (*Ibid*.) When it was discovered that everyone had been dealing with a stolen car, the dealer was forced to reimburse the true owner for the car's value ($1,400) in order to make good the purchaser's title. (*Ibid*.) The dealer then sued the bank on various causes of action including unjust enrichment, seeking to recover the $1,000 it had paid the bank to clear the title. (*Id*. at pp. 731-732.) The Court rejected the dealer's claims, concluding: "The bank, when it lent Cassaro $1,000 believed him to be the owner of the car; [the dealer] when he paid $1,250 for the car believed Cassaro to be its owner; both were mistaken but such type of mistake in the present circumstances is no basis for an action by one innocent party against another for restitution." (*Id.* at p. 733.) The Court noted that even though the bank's mortgage turned out to be invalid and its security worthless because the car thief did not actually have title to the car, the debt was valid and enforceable by the bank against the car thief. (*Ibid*. [" 'the duty to pay . . . is none the less binding because it is secured by mortgage' [citation]"].)

In *California Pacific*, J.J. MacArthur engaged in two fraudulent loan transactions involving real property belonging to Anita Hodgkin. (12 Cal.App.2d at p. 439.) First, MacArthur forged Hodgkin's signature and borrowed $2,500 from a bank, securing that loan with a deed of trust on Hodgkin's property. (*Ibid*.) When the bank learned of the fraud, it contacted MacArthur, who admitted the forgery and agreed to repay the bank. (*Ibid*.) The bank sent a reconveyance to an escrow company with instructions to surrender it upon payment. (*Ibid*.) MacArthur then met Eugene N. Smith and interested him in loaning money secured by a deed of trust on Hodgkin's property. (*Ibid*.) Smith inspected the property, agreed to make a loan, and deposited the money with a title insurance company with instructions to deliver the money "upon 'recordation deed of trust and note, Harry Roland . . . to Eugene N. Smith for $2[,]500 . . . .' " (*Ibid*.) "Without the knowledge

of any of the parties, MacArthur had forged a deed from . . . Hodgkin to Harry Roland, a fictitious person, and had executed a note and deed of trust in favor of Smith, signing the name Harry Roland." (*Id*. at p. 440.) Upon instructions from MacArthur and the title insurance company, the escrow title company paid the bank what it was owed and issued a check to Harry Roland for the remainder. (*Ibid*.) MacArthur endorsed the name of Harry Roland and cashed the check. (*Ibid*.)

When the parties discovered MacArthur's forgery in the Smith transaction, the title insurance company that had insured the validity of the Smith deed of trust paid Smith his loss, then took an assignment from Smith of all his rights and brought an action against the bank to recover what the bank had been paid in that transaction. (*California Pacific, supra*, 12 Cal.App.2d at p. 440.) The Court held the title insurance company could not recover against the bank because the bank was owed a "just debt" and had no knowledge of MacArthur's fraudulent acts in connection with the Smith loan transaction, i.e., the bank was a bona fide creditor. (*Id*. at pp. 441, 444.)

Similarly, here, defendants were bona fide creditors because they were legitimately owed a debt and were unaware of Ransom's fraudulent acts. Toups did not present any evidence to show that defendants knew, at the time they loaned Ransom $25,000 and secured the loan against the Quesada property, that Ransom had no right to the Quesada property. Toups also did not present any evidence that Chen and Li were aware, at the time of the $83,000 payoff, that Ransom had been sued by Toups in 2004 for fraudulent acts relating to the Quesada property, or that he had provided Toups with a quitclaim deed and a forged reconveyance of Chen and Li's trust deed. In fact, Toups alleges in her complaint—and it was her position below—that it was "irrelevant" whether defendants ever signed a reconveyance or were aware of "Ransom's duplicity." Without knowledge of Ransom's fraudulent acts, and without having signed a reconveyance, Chen and Li had no reason to question why an escrow agent had contacted them to obtain a payoff demand, or why their $83,000 came through escrow from money Ransom had borrowed against the Quesada property. The undisputed facts do not support summary adjudication in favor of Toups on her first cause of action for unjust enrichment.

Toups asserts that defendants were not "creditors" because Ransom was not the rightful owner of the Quesada property and the $25,000 loan that was secured against the Quesada property was therefore invalid. As the *Hilliard* court stated, however, " 'the duty to pay . . . is none the less binding because it is secured by mortgage' [citation]." (*Hilliard, supra,* 102 Cal.App.2d at p. 733.) Just as the bank in *Hilliard* was a creditor entitled to keep its money despite the fact that the mortgage securing the loan was worthless, defendants were creditors of a legitimate debt against Ransom even though the trust deed that secured $25,000 of the debt turned out to be invalid.

Next, relying on cases in which stolen goods were returned to their rightful owners, Toups argues she is entitled to restitution because "[a] thief can not pass good title to stolen, or converted, goods," and "Ransom converted [Toups's] equity into money that he used to pay his debts to [defendants]." (Citing, e.g., *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906 [the court imposed a constructive trust on Marilyn Monroe's personal effects, which had been converted by Monroe's assistant, and ordered them returned to the rightful owner]; *Naftzger v. American Numismatic Society* (1996) 42 Cal.App.4th 421, 432 [purchaser of rare coins that turned out to be stolen from a museum was required to return the coins to the museum because "a thief cannot convey valid title to an innocent purchaser of stolen property"].) It has long been settled, however, that money and negotiable securities are the exception to the general rule that a thief cannot pass good title to stolen property. (*Sun 'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 686 ["title to bearer paper passes with the instrument even through the hands of a thief"]; *Barstow v. Savage Mining Co*. (1883) 64 Cal. 388, 390; *Schoen v. Houghton* (1875) 50 Cal. 528, 529 ["The finder of negotiable paper, or the thief who steals it, acquires no title, but either may transfer a good title to a *bona fide* purchaser"].) Because the money Chen and Li received was not "stolen property," they were not required to return it to the rightful owner.[5]

[5] We note that in any event, it is unclear who the rightful owner of the $83,000 was. Toups's argument appears to be that because Ransom fraudulently encumbered the Quesada property by $300,000 and paid $83,000 of it to defendants, the $83,000 was essentially "stolen" from her and must be repaid to her. The undisputed facts, however,

Involuntary trust

"A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. [Citations.] The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing." (*Communist Party v. 522 Valencia, Inc*. (1995) 35 Cal.App.4th 980, 990.) The circumstances under which constructive trusts are imposed are set forth in Civil Code section 2223, which provides, "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner," and section 2224, which provides, "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." In order to prevail on a constructive trust theory, a plaintiff must plead some underlying cause of action, such as fraud, breach of fiduciary duty, or other basis for recovery that entitles the plaintiff to relief. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 840, p. 255; *Michaelian v. State Comp. Ins. Fund,* (1996) 50 Cal.App.4th 1093, 1114.) "Pleading requirements are: (1) facts constituting the underlying cause of action, and (2) specific identifiable property to which defendant has title." (*Michaelian v. State Comp. Ins. Fund, supra*, 50 Cal.App.4th at p. 1114.)

Here, Toups's cause of action for involuntary trust was based on the same facts presented in support of her unjust enrichment claim. In her complaint, she alleged as to her cause of action for involuntary trust that defendants were engaged in "wrongful detention" of "money that Ransom [had] stole[n] from [her]." She argued in support of summary adjudication that defendants had an obligation to hold the $83,000 in trust for her

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show that Ransom fraudulently induced Spataro—not Toups—into giving him the money that was paid to Chen and Li. Spataro has since been made whole and the encumbrance from the $300,000 loan presumably no longer exists. Thus, although Toups claims she has incurred $126,600 in "debt and attorney's fees" in connection with the settlement of the 2008 lawsuit that are "now secured against the [Quesada] property," she owns the Quesada property free and clear of the original $300,000 that was fraudulently taken from Spataro, and of the $83,000 that was disbursed to defendants.

because they were "not justly entitled to keep property that was literally stolen from [her]." In light of our conclusion that the undisputed facts do not support the granting of summary adjudication as to Toups's cause of action for unjust enrichment, we conclude that summary adjudication as to her cause of action for involuntary trust, which is based on her unjust enrichment claim, also fails.

Cross-appeal

Toups's sole contention in her cross-appeal is that the trial court erred in denying her request for attorney fees and costs as the prevailing party in the action. Because we reverse the judgment that was entered in Toups's favor, we decline to address the contention, dismiss the cross-appeal as moot, and vacate the trial court's order denying attorney fees and costs.

DISPOSITION

The judgment is reversed. Plaintiff's cross-appeal of the order denying attorney fees is dismissed as moot and the order is vacated. Defendants shall recover their costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.